Supreme Court, U.S.
FILED
JAN 11 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-855

RICHARD ERNEST FRITTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALAN SALTZMAN and
MARTHA GOLDIN
6430 Sunset Blvd.
Suite 521
Hollywood, Ca. 90028
(213) 461-3464

Attorneys for
Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

RICHARD ERNEST FRITTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALAN SALTZMAN and
MARTHA GOLDIN
6430 Sunset Blvd.
Suite 521
Hollywood, Ca. 90028
(213) 461-3464

Attorneys for
Petitioner

TOPICAL INDEX

	Page
TABLE OF AUTHORITIES	ii
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	22
APPENDIX "A"	
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	
APPENDIX "B"	
ORDER DENYING REHEARING	
APPENDIX "C"	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	

TABLE OF AUTHORITIES

Cases	Page
Barnes v. United States, 347 F.2d 925 (8th Cir. 1965)	12
Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402 (1946)	14
Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968)	10
Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917)	10
Cash v. Culver, 58 U.S. 633, 79 S.Ct. 432 (1959)	10
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967)	16
Cool v. United States, 409 U.S. 100, 93 S.Ct. 354 (1972)	15
Crawford v. United States, 212 U.S. 183, 29 S.Ct. 260 (1909)	10, 15
Holmgren v. United States, 217 U.S. 509, 30 S.Ct. 588 (1910)	10
In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970)	15

Cases	Page
Irwin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961)	21
McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969)	18
McMillen v. United States, 386 F.2d 29 (1st Cir. 1967)	12, 15
McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 (1943)	17
On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967 (1952)	10, 18
Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966)	20
Tillery v. United States, 411 F.2d 644 (5th Cir. 1969)	12
United States v. Casale Car Leasing Inc., 385 F.2d 707 (2d Cir. 1967)	14
United States v. Evans, 398 F.2d 159 (3rd Cir. 1968)	12
United States v. House, 471 F.2d 886 (1st Cir. 1973)	12
United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974)	12, 15, 17

Cases	Page
United States v. Marsh, 451 F.2d 219 (9th Cir. 1971)	13
United States v. Martin, 489 F.2d 674 (9th Cir. 1973)	13
United States v. Owens, 460 F.2d 268 (10th Cir. 1972)	11
Williamson v. United States, 332 F.2d 123 (5th Cir. 1964)	14, 15

UNITED STATES CONSTITUTION

Fifth Amendment	4
Sixth Amendment	4

STATUTES AND RULES

21 U.S.C. §841(a)(1)	2, 4
§952(a)	2, 4
§960(a)(1)	2, 4
§963	2, 4
28 U.S.C. §1254(1)	2
42 U.S.C. §1985	20
Federal Rules of Criminal Procedure Rule 52b	4

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

RICHARD ERNEST FRITTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, RICHARD ERNEST FRITTS, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 19, 1974.

OPINION BELOW

The opinion of the court below is not yet reported, and appears as Appendix "A"

herein. No written opinion was rendered by the United States District Court for the District of Arizona.

JURISDICTION

The judgment and opinion of the court below was entered on September 19, 1974, affirming Petitioner's conviction in the United States District Court for the District of Arizona for violations of 21 U.S.C. §963, 21 U.S.C. §§952(a), 960(a)(1), and 21 U.S.C. §841(a)(1). A timely Petition for Rehearing was denied on November 15, 1974. A copy of the order denying rehearing appears as Appendix "B" herein. Mr. Justice Douglas extended the time in which to file this Petition for Writ of Certiorari to and including January 14, 1975, and this Petition for Writ of Certiorari is being filed within the time so allowed. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The case was tried and submitted to a jury entirely upon the uncorroborated testimony of three accomplices. Shortly before trial each accomplice had been released from federal custody, granted immunity from prosecution, and/or freed from pending prosecution on federal felony charges in exchange

for his testimony at trial. Despite this, no cautionary instruction with regard to the suspect/accomplice evidence was requested by Petitioner's trial counsel and none was given by the trial court on its own motion. The court below, one judge dissenting, held the failure to give a cautionary instruction to be neither a constitutional nor a plain error.

Petitioner's defense was seriously impaired as a result of prosecution intimidation of defense witnesses. The trial court cautiously remonstrated against this prosecutorial misconduct but gave counsel for Petitioner no opportunity to rectify the harm done to the defense. The case was submitted to the jury tainted by the misconduct.

The questions presented in this context are:

1. Whether failure of the trial court to give a cautionary instruction with regard to the uncorroborated accomplice testimony deprived Petitioner of a fair trial and due process of law.

2. Whether failure of Petitioner's counsel to request a cautionary instruction with regard to the uncorroborated accomplice

testimony rendered his assistance ineffective and deprived Petitioner of right to counsel as guaranteed by the Sixth Amendment to the Constitution.

3. Whether Petitioner's conviction based solely upon evidence tainted by prosecutorial misconduct deprived him of due process of law guaranteed by the Fifth Amendment to the Constitution.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional provisions involved are the relevant portions of the Fifth and Sixth Amendments to the Constitution; the statutory provisions involved are 21 U.S.C. §963, 21 U.S.C. §§952(a) and 960(a)(1), and 21 U.S.C. §841(a)(1); and the rule involved is Rule 52b of the Federal Rules of Criminal Procedure, all of which appear as Appendix "C" herein.

STATEMENT OF THE CASE

Petitioner, a Southern California businessman, was indicted in Arizona, charged with conspiracy to import marijuana, importation of marijuana, and possession with intent to distribute marijuana, in violation of 21 U.S.C. §§963, 952(a) and 960(a)(1), and 841(a)(1). He was tried by a jury.

The evidence was, essentially, that he had arranged for the rental of a camper truck with knowledge that it would be used to smuggle marijuana out of Mexico; that the truck was used for that purpose; and that he had an interest in the smuggled marijuana. There was no evidence that Petitioner had ever been in actual possession of the marijuana. The evidence against him was virtually uncorroborated accomplice testimony, some of which was given by an admitted perjuror. In his dissenting opinion below, Judge Ely described the quality of the accomplice' testimony which was submitted to the jury:

> "[O]ne of the accomplices who testified for the prosecution had been granted immunity in exchange for his incriminating testimony against appellant, given by the accomplice before the Grand Jury. For a prior offense, this accomplice had been in the custody of federal penal authorities, but he was freed in advance of the time of appellant's trial.
>
> "The second accomplice who

testified against the appellant was originally charged with the commission of three felonies in connection with the transaction involving the appellant. The prosecution dismissed two of these felony charges before this accomplice presented his testimony incriminating the appellant. Moreover...[a] state prosecution was apparently abandoned quite suddenly, whereupon this accomplice was released from federal custody on the same day that the first accomplice was released, only fourteen days before...appellant's trial....

"The third accomplice offered by the prosecution was charged with three felonies arising from the transaction in which the appellant was alleged to have been involved. The government dismissed all of the charges against this accomplice before he testified for the prosecution." (Appendix A-2, A-3).

At the close of the Government's case, counsel for Petitioner made a motion for judgment of acquittal on the ground that the accomplice testimony was so tainted that a jury should not be permitted to rely on it. The motion was denied.

Petitioner, on his own behalf, sought to establish his complete innocence. He testified, denying any involvement in the smuggling scheme. His witnesses, while expressing knowledge that Petitioner had been a long standing friend of one of the chief prosecution witnesses, corroborated his protestations of non-involvement. Several of them, in addition, testified that they had been intimidated by the prosecutor and representatives of his office. On more than one occasion the trial judge remarked about the problem, once stating, "It couldn't be anything else except intimidation."

A motion for judgment of acquittal at the close of the entire case was made and denied. The cause was then submitted to the jury without any instruction informing them how to deal with the tainted accomplice evidence. The jury returned a verdict of guilty on each count of the indictment.

Petitioner was sentenced to eighteen

months imprisonment on each count, the terms to be served concurrently.

The opinion of the Court of Appeals (Appendix "A") was rendered on September 19, 1974.

With respect to the failure of the court sua sponte to give a cautionary instruction on accomplice testimony, a majority of the panel which decided the case merely said that the argument "that uncorroborated accomplice testimony cannot lead to a conviction has been...rejected." It added, "Fritts' argument that the government's use of an accomplice witness after granting immunity, early parole or other favors violates Fritts' due process rights is rejected." By contrast, in his dissent, Judge Ely said, "I can recall no stronger case for a holding that the court's failure, acting sua sponte, to present a cautionary instruction in respect to the prosecuting testimony of the accomplices constituted reversible error."

The trial judge, mistakenly believing that there was no way it could be done, would not allow Petitioner's counsel to testify in order to overcome what appeared to be the effect of the intimidation of a witness. With respect to the claim, on

appeal, that this was reversible error, the court below said that as there was no offer of proof made it would not speculate that the evidence should have been received.

In only one respect did the court below express some slight misgivings. It noted that the trial judge had remarked before the jury that the prosecutor had intimidated a witness. It decried "such conduct," but declined to reverse Petitioner's conviction.

The judgment of conviction was affirmed. Petitioner, however, was permitted to remain at liberty on bail.

REASONS FOR GRANTING THE WRIT

A.

1. In the case at bar a divided panel of the Ninth Circuit rendered a decision which, in effect, says that unless requested to, the trial court need give the jury no guidance in its consideration of accomplice testimony, no matter how suspect that testimony and how lacking it is in corroboration. The decision is contrary to principles enunciated by this Court and it is in conflict with the developing law in other circuits.

The guiding principles appear to be well-established, but their application remains largely unsettled by this Court.

In Crawford v. United States, 212 U.S. 183, 29 S.Ct. 260 (1909), this Court noted the unreliability of accomplice testimony and said that it "ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other apparently credible witnesses." (212 U.S. at 204). In Holmgren v. United States, 217 U.S. 509, 30 S.Ct. 588 (1910), this Court emphasized that it is "the better practice for courts to caution juries against too much reliance upon the testimony of accomplices...." (217 U.S. at 524). See also Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917). And, in On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967 (1952) this Court held that accomplice testimony is competent, but suspect, and warned that it should be submitted to the jury "with careful instructions." (343 U.S. at 757). Cf., Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968); Cash v. Culver, 358 U.S. 633, 79 S.Ct. 432 (1959).

Though it has often reiterated the "better view" with respect to the giving of a cautionary instruction on accomplice testimony and implicitly recognized that failure to give such an instruction is error,

this Court has not decided what consequences flow from failure of counsel to request one and of the trial court to give one. The circuits are in conflict on these questions.

The Court of Appeals for the Tenth Circuit has apparently decided that where accomplice testimony is the only evidence directly implicating the defendant a special cautionary instruction must be given by the court sua sponte. Failure of the trial court to give such an instruction is, that Circuit has held, plain and reversible error per se. United States v. Owens, 460 F.2d 268 (10th Cir. 1972).

While declining to adopt a per se rule, the First Circuit has observed that such a rule is salutary, sensible and efficient:

> "The burden in the trial court of routinely including a cautionary instruction in cases dominated by informant or accomplice testimony would not seem to be excessive. And the benefit, in terms both of fair trials and eliminating appeals, would seem to be substantial. Were we to face

this situation with any frequency, especially in less clear cases, we would most seriously consider adopting a more stringent, per se rule." United States v. House, 471 F.2d 886, 889 (1st Cir. 1973).

Other courts of appeals have utilized the "plain error" rule in determining whether failure of the court to give a special accomplice evidence instruction requires reversal, with the general result that plain error is acknowledged to exist where "virtually all of the government's case rested upon the accomplice's testimony." Tillery v. United States, 411 F.2d 644, 647 (5th Cir. 1969); United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974); Barnes v. United States, 347 F.2d 925 (8th Cir. 1965). Cf., United States v. Evans, 398 F.2d 159 (3rd Cir. 1968); McMillen v. United States, 386 F.2d 29 (1st Cir. 1967).

By contrast, the Ninth Circuit has adopted a standard which permits a finding of plain error "only where there is a strong need for the instruction: for example, where the accomplice's testimony

is almost entirely uncorroborated and it is, as well, both critical and suspect." United States v. Martin, 489 F.2d 674, 677, n.3 (9th Cir. 1973). See United States v. Marsh, 451 F.2d 219 (9th Cir. 1971). It has been characterized as a "qualified" plain error rule (United States v. Martin, supra, 489 F.2d at 678, Ely, J., concurring) which rejects the well-established principle so often repeated by this Court, that accomplice testimony is always inherently suspect.

The "qualified" rule of the Ninth Circuit is in conflict with decisions of other courts of appeals. For, it is extremely restrictive, rejecting the possibility of "plain error" even in the most egregious case. In effect, it sees no manifest injustice ever arising out of lack of the instruction, and reduces all error with respect to the absence of the instruction to "harmless error." Furthermore, it permits a case, such as the one at bar, to be decided by a jury which does not know how to view the testimony.

2. A per se reversal rule commends itself where no cautionary instruction on accomplice testimony has been given. It is, after all, "not the parties who determine the charge the judge gives to the jury. The obligation rests squarely on the shoulders of the trial judge." Williamson v. United States, 332 F.2d 123, 132 (5th Cir. 1964). Cf., Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402 (1946); United States v. Casale Car Leasing Inc., 385 F.2d 707 (2d Cir. 1967). As the court in House observed, it is not burdensome to require the trial judge to give such an instruction whenever the evidence warrants it. And, it does assure a fair trial in such circumstances, thus avoiding needless appeals involving the issue. A per se reversal rule would merely enforce the trial court's responsibility.

In any case, the "plain error" rule, particularly as "qualified" by the Ninth Circuit in its decisions determining the prejudicial effect of the failure to give a cautionary instruction, does not seem to be appropriate. The cautionary instruction appears to be constitutionally impelled. The premise for the instruction is that it will reduce the likelihood

that the jury will give undue credence to accomplice testimony. Cf., Crawford v. United States, supra; McMillen v. United States, supra; Williamson v. United States, supra. See also, United States v. Leonard, supra, 494 F.2d at 975, Bazelon, C.J., concurring and dissenting. For, if the jury does, it may return a verdict based upon suspect--that is, doubtful--testimony. Uninstructed, it may thus render a verdict against the defendant on less than proof beyond a reasonable doubt.

In In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) this Court made it clear that the reasonable doubt standard is a constitutional requirement. This Court has also held that an instruction which substantially reduces the Government's burden of proof violates the constitutional requirement of proof beyond a reasonable doubt. Cool v. United States, 409 U.S. 100, 93 S.Ct. 354 (1972). It logically follows that the absence of an instruction which is necessary to inform the jury that the accomplice testimony may be inherently doubtful and not sufficient to meet the constitutionally required standard of proof reduces the Government's burden of

proof; and that such an instruction is therefore constitutionally compelled in order to give full effect to the reasonable doubt standard. Failure of the trial court to give the instruction must, therefore, be error of constitutional dimensions.

In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), this Court said that constitutional error "which possibly influenced the jury adversely to a litigant" cannot be deemed harmless. (386 U.S. at 23). It disapproved the placing of the burden upon the injured defendant to prove that he had been prejudiced. Instead, in those cases not calling for automatic reversal, this Court called upon the beneficiary of the error to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24. It is, minimally, the Chapman standard which should be used in a case such as the one at bar.

3. Whether or not an accomplice instruction is constitutionally required, one should be required in all cases relying upon accomplice testimony, to insure the fair administration of criminal justice. A criminal trial in the federal

court system should not be a matter of gamesmanship. The fairness of the trial should not be made to depend solely upon the alertness of defense counsel. "Responsibility for the fairness of the process, for the reasonable accuracy of jury verdicts, rests, and should rest, not on the defense alone, but also on the trial court and, indeed, the Government." United States v. Leonard, supra, 494 F.2d at 976, Bazelon, C.J., concurring and dissenting. Nor should it be made to depend solely upon the happenstance that the trial takes place in one circuit rather than another.

This Court is peculiarly responsible for assuring the fairness of federal criminal trials. It does so not only by enforcing concepts of liberty and justice embodied in "due process of law," but also by allowing itself to be "guided by considerations of justice." McNabb v. United States, 318 U.S. 332, 341, 63 S.Ct. 608 (1943). These considerations imply "the duty of establishing and maintaining civilized standards of procedure and evidence." Id. at 318 U.S. 340. The uniform imposition upon the trial judge of a responsibility which is in general already

his, which will insure fair trials and eliminate some appeals, fully comports with "civilized standards of procedure." Such a rule, maintained by the sanction of reversal for failure to comply with its command, would benefit litigants and judicial resources. Cf., McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969).

4. Notwithstanding that accomplice testimony is admissible, and although uncorroborated may sustain a conviction, in the case at bar it was grossly unfair. The crucial testimony was uniquely unreliable. For, in the instant case, the chief prosecution witness was a convicted felon, a self-confessed unconvicted perjurer, and an admitted accomplice. His testimony was obviously the product of his obligation to the Government, which gave him immunity from prosecution for perjury, early parole, and apparently the dropping of state charges against him. The extreme steps taken here by the Government to assure favorable testimony deprived Petitioner of due process of law. Cf., On Lee v. United States, supra, Mr. Justice Frankfurter, dissenting.

This was, therefore, a case in which failure of the trial court to give a cautionary instruction on its own motion was so outrageous that it deprived Petitioner of a fair trial and due process of law.

B.

Prosecutorial misconduct prejudicially infected the trial. At least three of the defense witnesses were approached by the prosecutor in an intimidating manner. In one instance, the trial judge ruled that the prosecutor had intimidated the witness and insisted that his remarks be "on the record." Of the prosecutor's conduct, a majority of the panel which decided this case said, "[W]e decry such conduct" (Appendix "A", p.1), but concluded that it did not require reversal because it did not disclose that the testimony had been affected by the intimidation.[1/]

1/ The majority erroneously stated that it was the witness, Palmer, who had been intimidated and whose testimony was unaffected by the intimidation. Palmer was the chief prosecution witness, the man who admitted he had perjured himself and who was the beneficiary of substantial Government favors in this case. The trial judge ruled that defense witness, Carroll J. Johnson, had been intimidated.

There are compelling reasons why, whether or not the record discloses that witness' testimony has been affected by prosecution intimidation, the case should be reversed. Such a rule, at least in a case like the instant one, in which all the prosecution witnesses have been extended gratuities in exchange for their testimony, and in which most if not all of the defense witnesses have been threatened by the prosecutor, a reversal is required in order to control the behavior of the prosecution. There can be no doubt that the prosecutor's conduct in the instant case was reprehensible. It bordered on (or may have been) a violation of the law. See 42 U.S.C. §1985. This Court should not tolerate a trial so infected with prosecutorial misconduct.

Nor should this Court demand that the result of the intimidation be demonstrable on the record. It is well recognized that there are some human responses to pressure which cannot be documented, but which must be presumed to have affected a defendant's right to a fair trial. See, e.g., the undue pre-trial publicity cases: Sheppard v. Maxwell, 384 U.S. 333,

86 S.Ct. 1507 (1966); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961). When, as here, witnesses have been intimidated before testifying, by no less an authority than a representative of the Government, it must be presumed that their subsequent testimony is affected. It may be that the witnesses themselves believe that they are testifying as fully, freely, and credibly as they would have had they not been intimidated. Yet, in a case in which their credibility is the principle issue, subtle shadings of the voice and expression, fears not articulated or even recognized by the witnesses themselves may creep into their testimony and be sensed by the jury. The mere possibility of this happening, alone, without any evidence that the witnesses actually changed their testimony or refused to testify should be ample to require a holding that the trial has been tainted and the defendant deprived of a fair trial and due process of law.

There is, furthermore, a clear intimation in this case that defense witness Jenkins, who had apparently told Petitioner's trial counsel that chief prosecution witness Palmer was out to "get" Petitioner,

changed his testimony after a visit from the prosecutor. Although it is not clear that he was threatened by the prosecutor, in light of other evidence in the record, the reason for the change in his testimony is open to question. This additional peculiarity in the trial merely lends factual strength to Petitioner's argument that prosecutorial misconduct, regardless of its demonstrable impact, deprives a trial of fundamental fairness.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ALAN SALTZMAN and
MARTHA GOLDIN

BY: MARTHA GOLDIN

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RICHARD ERNEST FRITTS, *Defendant-Appellant.*	No. 74-1331 OPINION

[September 10, 1974]

Appeal from the United States District Court
for the District of Arizona

Before: ELY and WALLACE, Circuit Judges,
and POWELL,* District Judge

WALLACE, Circuit Judge:

Fritts was convicted of conspiracy to import marijuana, 21 U.S.C. § 963, importation of marijuana, 21 U.S.C. §§ 952(a), 960 (a)(1), and possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1). We affirm.

As regards the first claimed error, we do not believe the question of whether Fritts' attorney would be allowed to testify was properly before the trial court. If it were, there was no offer of proof made as to what he would testify. *See United States v. Crowder*, 464 F.2d 1284 (9th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); McCormick, Law of Evidence § 51, at 110 (2d ed. 1972). We decline to guess, as suggested by Fritts.

The trial judge stated before the jury that the prosecutor had intimidated the witness Palmer. While we decry such conduct, it

---

*Honorable Charles L. Powell, United States District Judge, Eastern District of Washington, sitting by designation.

does not require reversal of this conviction since the record does not disclose that Palmer's testimony was affected by the intimidation. *See Fuller v. Cox,* 315 F.Supp. 867, 870 (W.D. Va. 1970).

Finally, Fritts claims reversal is in order because the trial court failed to give, on its own motion, a cautionary instruction on accomplice testimony. We have already rejected the contention. *United States v. Randall,* 491 F.2d 1317 (9th Cir. 1974). The parallel argument that uncorroborated accomplice testimony cannot lead to a conviction has been similarly rejected. *United States v. Castro,* 476 F.2d 750 (9th Cir. 1973). Fritts' argument that the government's use of an accomplice witness after granting him immunity, early parole or other favors violates Fritts' due process rights is rejected.

AFFIRMED.

ELY, Circuit Judge (Dissenting):

I respectfully dissent. I can recall no stronger case for a holding that the court's failure, acting *sua sponte,* to present a cautionary instruction in respect to the prosecuting testimony of the accomplices constituted reversible error. Concerning this, I have hitherto expressed my general views in *United States v. Randall,* 491 F.2d 1317 (9th Cir. 1974).

In the present case, one of the accomplices who testified for the prosecution had been granted immunity in exchange for his incriminating testimony against the appellant, given by the accomplice before the grand jury. For a prior offense, this accomplice had been in the custody of federal penal authorities, but he was freed in advance of the time of the appellant's trial.

The second accomplice who testified against the appellant was originally charged with the commission of three felonies in connection with the transaction involving the appellant. The prosecution dismissed two of these felony charges before this accomplice presented his testimony incriminating the appellant. Moreover, this prosecution witness had also been in federal custody because of a prior conviction and his application for parole had been rejected because ot a pending criminal charge in a state court. But the state prosecution was apparently abandoned quite

suddenly, whereupon this accomplice was released from federal custody on the same day that the first accomplice was released, only fourteen days before the occurrence of the appellant's trial. The Government's simultaneous releasing of these two felons on the same date would seem to be, of itself, remarkably coincidental.

The third accomplice offered by the prosecution was charged with three felonies arising from the transaction in which the appellant was alleged to have been involved. The Government dismissed all of the charges against this accomplice before he testified for the prosecution.

If the bare recitation of the above undeniable facts does not support my view that the trial judge should have instructed the jury that the testimony of the accomplices should be viewed with extreme caution, if not suspicion, then I doubt that elaborative argumentation could strengthen my foundation.[1]

I would reverse.

---

[1]To me, the failure of Fritts' defense attorney to request the cautionary instruction is thoroughly inexplicable. Surely, this neglect cannot be attributed to any valid strategic decision. If I am correct, Fritts may possibly be able to establish, in post-conviction proceedings under 28 U.S.C. § 2255, that he did not receive the effective representation of competent counsel.

In justice to Fritts' appellate counsel, it should be noted that he did not represent Fritts at the trial level.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 10-18-74—400

FILED

NOV 15 1974

U.S. COURT OF APPEALS CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-vs-

RICHARD ERNEST FRITTS,

Defendant-Appellant.

No. 74-1331

ORDER

Before: ELY and WALLACE, Circuit Judges, and POWELL,* District Judge

The majority of the panel, as constituted, has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Ely would grant a panel rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Charles L. Powell, United States District Judge, Eastern District of Washington, sitting by designation.

APPENDIX "B"

APPENDIX "C"

Fifth Amendment:

"No person shall...be deprived of life, liberty, or property, without due process of law...."

Sixth Amendment:

"In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

21 U.S.C. §963:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was

the object of the attempt or conspiracy."

21 U.S.C. §952(a):

"(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter...."

21 U.S.C. §960(a)(1):

"(a) Any person who--
(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance ...shall be punished as provided in subsection (b) of this section."

21 U.S.C. §841(a)(1):

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
(1) to manufacture, distribute, or dispense, or possess with intent to manu-

facture, distribute, or dispense, a controlled substance."

Rule 52b, F.R.Cr.P.:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-855

RICHARD ERNEST FRITTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court committed plain error by failing to provide an accomplice instruction *sua sponte*. Petitioner also contends that prosecutorial misconduct deprived him of due process.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of importation, possession with intent to distribute, and conspiracy to import marijuana into the United States, in violation of 21 U.S.C. 952(a), 960(a)(1), 841(a)(1), and 963. He was sentenced to concurrent terms of 18 months' imprisonment on each count, to be followed by a special three-year parole term. The court of appeals affirmed, one judge dissenting (Pet. App. A-1).

At trial, Alan Jones and James Palmer, petitioner's confederates in the importation scheme, testified that they met with petitioner to discuss smuggling marijuana from Mexico into the United States. At that meeting, they decided to obtain a pickup camper and install in it a false floor where marijuana could be concealed and smuggled through United States customs. Petitioner arranged for the camper rental, contacted a carpenter he knew who could alter the camper body, and supplied approximately half of the $2,000 for the marijuana purchase (Tr. 22-26, 58-65).

Jones and Palmer further testified that, after obtaining the camper from the rental agent and having the false floor installed, they traveled to Mazatlan, Mexico, and purchased between 60 and 80 kilogram packages of marijuana for about $10-$12 a pound (Tr. 24-32, 41, 59-74). Upon reentering the United States, however, customs officials at Nogales, Arizona, discovered the marijuana, except for eight kilogram packages concealed in the door panels.

Petitioner thereafter traveled to Nogales, posted bond for Jones and Palmer, and reclaimed the seized camper. Palmer testified that he and petitioner subsequently removed the door panels beneath the windows and recovered the eight kilogram packages. Petitioner thereupon sold about eight or nine pounds of it (Tr. 77-83).

Charles Martin, the rental agent from whom Jones and Palmer leased the camper, testified that petitioner had asked him to reserve the camper for a "fishing trip" in Mexico and had later advised him that he was ill and that the camper should be rented to his two associates (Tr. 121-124). After customs agents advised Martin that the vehicle had been impounded, petitioner volunteered to recover it. Petitioner returned the camper to Martin but subsequently removed it for about an hour to fix "a window problem." At the time he appeared nervous and in need of sleep (Tr. 124-130).

Customs Inspector Joseph Skaff testified that upon inspecting the camper at the Nogales, Arizona, border station, he found approximately 133 pounds of marijuana in 62 or 63 packages therein (Tr. 146-148).

Harold Willis, an acquaintance of petitioner and Palmer,[1] testified that petitioner had asked him "how he could go about bailing out Palmer without bringing any suspicion on him[self] or any heat on him[self]," and also had told him that he and Palmer had had compartments built into the camper "by a good friend of ours" (Tr. 165-167).

Carroll Johnson, the carpenter who installed the false floor on the camper, testified for the defense that Palmer, rather than petitioner, arranged for the modifications (Tr. 220-224). He also stated that the prosecutor and other government agents had approached him the previous evening and had threatened to prosecute him for perjury if he so testified. On cross-examination he admitted that defense counsel had authorized the prosecutor to interview him (Tr. 225-230).

1. Petitioner contends that, despite his failure to make a timely request for an accomplice instruction, the court's failure to so instruct the jury *sua sponte* was "plain error." Error of such magnitude has been found, however, only where the court has failed to give an accomplice instruction and accomplice testimony was the sole incriminating evidence adduced at trial, *United States* v. *Owens*, 460 F.2d 268 (C.A. 10), or where it was, in addition, "extremely unreliable, if not incredible and unsubstantial," *Tillery* v.

---

[1]Outstanding charges against Willis in this case were dismissed prior to trial on motion of the government (Tr. 174-175).

United States, 411 F.2d 644, 645 (C.A. 5). By contrast, no such error has occurred where, as here, despite the court's failure to give an accomplice instruction, accomplices "gave substantially the same, believable account of the group's activities in bringing marihuana into the United States from Mexico," *Davis* v. *United States*, 411 F.2d 1126, 1129 (C.A. 5), or where, as here, accomplice testimony was corroborated by other evidence, *United States* v. *Smith*, 459 F.2d 12 (C.A. 4); *United States* v. *Holt*, 427 F.2d 1114 (C.A. 8); *DeCarlo* v. *United States*, 422 F.2d 237 (C.A. 9); *United States* v. *Leonard*, 494 F.2d 955 (C.A.D.C.).[2]

The testimony of petitioner's accomplices in this case was not "incredible or otherwise unsubstantial." Jones and Palmer gave substantially the same detailed account of the smuggling operation and of the circumstances surrounding petitioner's involvement in the plan. Moreover, their testimony was corroborated by the testimony of other witnesses. Martin, who rented the camper used in the smuggling operation, testified to petitioner's arrangements for the rental and his subsequent interest in reclaiming the camper temporarily to repair a "window problem." In addition, defense witness Johnson, who modified the camper, corroborated the two accomplices' testimony in all respects but for the identity of the person who contacted him to build the compartment.

Moreover, while the trial court did not provide a complete accomplice instruction, it did caution the jury that it should (Tr. 311-312):

---

[2]*United States* v. *Evans*, 398 F.2d 159 (C.A. 3); and *McMillen* v. *United States*, 386 F.2d 29 (C.A. 1), certiorari denied, 390 U.S. 1031, cited by petitioner (Pet. 12), are inapposite. In those cases the failure to give an accomplice instruction was held reversible error since the court improperly charged the jury that it should presume a witness to be telling the truth.

carefully scrutinize the testimony given, the circumstances under which each witness has testified and *every matter in evidence which tends to indicate whether the witness is worthy of belief.*

Consider each witness' intelligence, motive and state of mind, his manner and demeanor on the witness stand. *Consider also any relation which each witness may bear to either side of the case, the manner in which each witness might be affected by your verdict*, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. [Emphasis supplied.]

2. Petitioner also contends that prosecutorial intimidation of defense witnesses was prejudicial. The record reveals, however, that defense witness Jenkins, allegedly intimidated by the government into not providing certain exculpatory testimony, expressly denied having been threatened, intimidated, or promised anything by the government (Tr. 244, 246, 251). And defense witness Johnson, while stating that he had been "intimidated" by the prosecutor's threat of a perjury prosecution (Tr. 229), nevertheless freely offered testimony that tended to exculpate petitioner.[3]

In any event, we submit that prosecutorial conduct was not "so prejudicial as to deprive petitioner of a fair trial." *N. Y. Central R. R. Co.* v. *Johnson*, 279 U.S. 310, 316. "[W]hether improper conduct of Government counsel amounts to prejudicial error depends, in good part, on the

---

[3]The trial court rebuked the prosecutor for having threatened Johnson with a perjury prosecution (Tr. 230) but declined to grant a mistrial.

relative strength of the Government's evidence of guilt." *Jones* v. *United States*, 338 F.2d 553, 554, n. 3 (C.A.D.C.); *Berger* v. *United States*, 295 U.S. 78, 89. Here, where the evidence tending to show petitioner's guilt was credible and substantial and where there was no misconduct leading to an actual failure to obtain favorable testimony, any misconduct was harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.